Recalling the Pentagon Papers Case, 50 Years On (Part Three)

May 11, 2021 **by Dan McCue**

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

Weather: Partly sunny, cool today; cloudy and cool tonight, tomorrow. Temp. range: today 56-72; Monday 62-74. Temp.-Hum. Index yesterday 69. Full U.S. report on Page 85.

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MAYOR'S BUDGET OF $8.8-BILLIONS AVOIDS LAYOFFS

ATTRITION ON JOBS

Losses Put at 14,320 And 5,013 Vacancies Due to Go Unfilled

By MARTIN TOLCHIN

Mayor Lindsay reduced his proposed expense budget by $277.2-million yesterday — mostly by postponing payments rather than reducing services — and presented an $8.8-billion budget that called for no layoffs of city employes.

"We're right at the hairline where it's possible for us to avoid layoffs," Edward N. Hamilton, the city's Budget Director, said at a City Hall briefing.

Mayor Lindsay said that the proposed budget "would allow New York City to maintain at minimally adequate levels the basic services which our citizens rely upon." The Mayor had described his previously submitted $9.1-billion budget as a "survival" budget.

$5-Billion for Employes

More than $5-billion of the proposed budget for the fiscal year beginning July 1 is earmarked for wages, pensions and fringe benefits for the city's 381,000 employes.

Thomas J. Cullo, City Council majority leader, with new budget papers.

COURT SAYS CITIES MAY CLOSE POOLS TO BAR RACIAL MIX

5-4 Ruling Backs Shutdown of Recreational Facilities to Blacks and Whites

By FRED P. GRAHAM

WASHINGTON, June 14— The Supreme Court ruled 5 to 4 today that communities may close their publicly owned recreational facilities rather than comply with court orders to desegregate them.

The dissenters protested that such closings expressed an official policy that "Negroes are unfit to associate with whites," but the majority held that Jackson, Miss., acted constitutionally when it closed its swimming pools rather than operate them on an integrated basis.

Because the city closed all pools to whites and blacks alike, its action did not deny Negroes the equal protection of the laws, the Court held.

Warning by Black

Justice Hugo L. Black, who wrote the majority opinion, went beyond the written decision in his statement from the bench to declare that the ruling was not an invitation to Southern communities to avoid school integration by closing schools.

"Any subterfuge used or utilized" to avoid school desegregation "will not be allowed," he said. He promised that "we will look through" any schemes by which public schools are closed and publicly supported segregated schools take their place.

MITCHELL SEEKS TO HALT SERIES ON VIETNAM BUT TIMES REFUSES

Vietnam Archive: Study Tells How Johnson Secretly Opened Way to Ground Combat

By NEIL SHEEHAN

President Johnson decided on April 1, 1965, to use American ground troops for offensive action in South Vietnam because the Administration had discovered that its long-planned bombing of North Vietnam—which had just begun—was not going to stave off collapse in the South, the Pentagon's study of the Vietnam war discloses. He ordered that the decision be kept secret.

"The fact that this departure from a long-held policy had momentous implications was well recognized by the Administration leadership," the Pentagon analyst writes, alluding to the policy axiom since the Korean conflict that another land war in Asia should be avoided.

Although the President's decision was a "pivotal" change, the study declares, "Mr. Johnson was greatly concerned that the step be given as little prominence as possible."

The decision was embodied in National Security Action Memorandum 328, on April 6, which included the following paragraphs:

"6. The President approved an 18-20,000 man increase in U.S. military support forces to fill out existing units and supply needed logistic personnel.

"6. The President approved the deployment of two additional Marine Battalions and one Marine Air Squadron and associated headquarters and support elements.

"7. The President approved a change of mission for all Marine Battalions deployed to Vietnam to permit their more active use under conditions to be established and approved by the Secretary of Defense in consultation with the Secretary of State."

The paragraph stating the President's concern about publicity gave stringent orders in writing to members of the National Security Council:

"11. The President desires that with respect to the actions in paragraphs 5 through 7, premature publicity be avoided by all possible precautions. The actions themselves should be taken as rapidly as practicable, but in ways that should minimize any appearance of sudden changes in policy, and official statements on these troop movements will be made only with the direct approval of the Secretary of Defense, in consultation with the Secretary of State. The President's desire is that these movements and changes should be understood as being gradual and wholly consistent with existing policy." [See text, action memorandum on change of mission, April 6, 1965, Page 21.]

The period of increasing ground-combat involvement is shown in the Pentagon papers to be the third major phase of President Johnson's commitment to South Vietnam. This period forms another section of the presentation of those papers by The New York Times.

The papers, prepared by a large team of authors in 1967-68 as an official study of how the United States went to war in Indochina, consist of 2,000 pages of analysis and 4,000 pages of supporting documents. The study covers nearly three decades of American policy toward Southeast Asia. Thus far The Times's reports on the study, with presentation of key documents, have covered the

This is the third in a series of articles on a secret study, made in the Pentagon, of American participation in the Vietnam war. The study was obtained from other sources by The New York Times through the investigative reporting of Mr. Sheehan. The series was researched and written over three months by Mr. Sheehan and other staff members. Three pages of documentary material begin on Page 19.

Continued on Page 22, Col. 1

COURT STEP LIKELY

Return of Documents Asked in Telegram To Publisher

By MAX FRANKEL

WASHINGTON, June 14— Attorney General John N. Mitchell asked The New York Times this evening to refrain from further publication of documents drawn from a Pentagon study of the Vietnam war on the ground that such disclosures would cause "irreparable injury to the defense interests of the United States."

If the paper refused, another Justice Department official said, the Government would try to forbid further publication by court action tomorrow.

The Times refused to halt publication voluntarily.

The Justice Department's request and intention to seek a court enjoinder were conveyed by Robert C. Mardian, Assistant Attorney General in charge of the internal security division, to Harding F. Bancroft, executive vice president of The Times.

Spoke by Telephone

They spoke by telephone at about 7:30 P.M., which was some two hours before tomorrow's first edition of the paper was scheduled to go to press with the third installment of the articles about the Pentagon

JERSEY APPROVES AIRPORT RAIL LINK

FACTORY OUTPUT CLIMBED IN MAY

Italian Neo-Fascists Make Gains in Regional Voting

U.S. SUES SUBURB ON HOUSING BIAS

The White House goes to court to block publication.

*(This is the third part of a four-part series. The first and second installments can be read **here** and **here**.)*

White House Makes Its Move

Ultimately, the decision to seek prior restraint — an injunction prohibiting The Times from publishing future articles — was made by Robert Mardian, the assistant attorney general for Internal Security Affairs.

At the time, of course, Mardian had no idea what was in the documents, but in the interest of erring on the side of caution, he decided the most prudent thing to do would be to give The Times a chance to stop publishing voluntarily. If that failed, then the White House would have no choice but to go to court to stop it.

The Telex from the attorney general set off a firestorm at The Times, with editors and executives splitting into factions, for and against publishing. Finally, Abe Rosenthal insisted on calling Arthur Sulzberger in London — it was 2 a.m. there by this time — and James Goodale urged him to allow publication.

Sulzberger wasted no time in coming to a decision. The New York Times would not voluntarily submit to censorship. The publisher ordered the printing to continue. In the meantime, the newspaper issued a statement announcing it would "respectfully decline" the government's request to stop publication of the series

Abe Rosenthal, Arthur Sulzberger, Hedrick Smith, and Jerry Gold review the Pentagon Papers story in the New York Times. (Photo via Wikimedia Commons)

That Tuesday morning, the third article in the Pentagon series ran on the front page. Above it, however, was another, though related

story: “Mitchell Seeks to Halt Series on Vietnam but Times Refuses.”

A bare-knuckled legal battle was now unavoidable, but Goodale was in a fix — Lord, Day and Lord declined to take the case.

Goodale’s next step was to call a Yale Law professor named Alexander Bickel, with whom he’d already discussed the controversy surrounding the papers. Unable to immediately locate Bickel, he then called Floyd Abrams, an associate of Bickel’s and a partner at the New York firm of Cahill Gordon.

By dawn Tuesday, Bickel had been located and he and Abrams were hard at work on their arguments for the next morning’s now certain court appearance.

Case Handed to Novice Judge

The Pentagon Papers case was assigned by lot to U.S. District Judge Murray Gurfein, a new Nixon appointee, who had been sworn in only a week before.

At 63, this case was his first as a judge, and by the time he took his seat behind the bench in the U.S. Courthouse in New York’s Foley Square, the courtroom was packed with spectators.

Arguing for the government was U.S. Attorney Michael D. Hess. The gist of the government’s arguments was The Times had violated a statute that makes it a crime for persons having “unauthorized possession” of government documents to disclose their contents under circumstances that “could be used to the injury of the United States or to the advantage of any foreign nation.”

Hess claimed “serious injuries are being inflicted on our foreign relations, to the benefit of other nations opposed to our form of government.”

With the government facing the prospect of "irreparable injury" in its international relations, Hess said the Times should be required to suffer at least a "slight delay" in its publication schedule until the case could be heard in its entirety.

At 46, Bickel was not only a renowned legal scholar — he was already being mentioned as a possible Supreme Court nominee.

"Tanned and dapper" according to news accounts of the hearing, Bickel replied to Hess on behalf of The Times by arguing that this was a "classic case of censorship" that was forbidden by the First Amendment's guarantee of a free press.

He also insisted the statute being evoked by the government was an anti-espionage law that had never been intended by Congress to be used against the press.

The Washington Post building. (Photo by Dan McCue)

To bar a newspaper from publishing certain matter "for the first time in the history of the Republic," would set an unfortunate precedent, he said.

"A newspaper exists to publish, not to submit its publishing schedule to the United States government."

Judge Gurfein granted the government's request for a temporary restraining order — the first time in U.S. history that a court, on national security grounds, had stopped a newspaper in advance from publishing a specific article.

Outraged, The Washington Post soon began preparing to run its own articles based on documents Ellsberg had given its reporters. As at The Times, however, the decision to move forward didn't come easy. A fierce battle erupted between the newsroom and the paper's reluctant attorneys.

Finally, publisher Katherine Graham sided with the newsroom, and the Post joined The Times on the front lines of the censorship battle.

Several other newspapers across the country soon followed suit.

The court proceedings that followed had a frantic rapid-fire air to them, and as the hearings, most of them closed to the public, went on, the government's case began to crumble as it became ever clearer that there was no immediate military danger that could be caused by publishing the contents of a three-year-old report.

Indeed, much of the information the White House claimed it was so incensed about was already in the public domain, having been revealed at Congressional hearings or reported by the press.

In fact, Vice Adm. Francis J. Blouin, deputy chief of Naval Operations for Plans and Policy admitted his testimony was based not on fear

of any immediate military peril but on the more general ground that "there is an awful lot of stuff in [the Pentagon study] that I would just prefer to see sleep a while longer."

On Saturday, June 19, 1971, Judge Gurfein decided the case in favor of the Times, prompting the government's attorneys to rush upstairs in the same courthouse to obtain an appellate court order continuing the ban on publication.

The following Wednesday, the appeals court went a step further and ordered Gurfein to conduct additional hearings so the government could fully air its case.

It was at this point that both The Times and The Washington Post filed papers seeking emergency review of the case by the U.S. Supreme Court.

The reaction to all this on Capitol Hill was swift. Upon reading the first of The Times' Pentagon Papers stories, Senate Majority Leader Mike Mansfield announced that the Senate Foreign Relations subcommittee on the Far East would hold public hearings on how the United States had become involved in the Vietnam War.

The Montana Democrat told reporters that he had been "surprised, shocked and astounded" by the revelations in the documents … largely because it was now apparent the Johnson administration had made the decision to enlarge the war in Vietnam without informing Congress.

Sen. Henry Jackson, of Washington, vowed to press for a joint hearing by the Senate Armed Services Committee and the Foreign Relations Committee.

(*The story of the Pentagon Papers* ***concludes*** *with the Supreme Court handing down a landmark decision in favor of a free press.*)

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